QUESTIONS PRESENTED

(1) Does the Fifth Amendment to the Constitution afford a witness in a proceeding authorized by Act of Congress the right to refuse to answer questions which may incriminate him under a state statute?

(2) Where a witness at an investigation authorized by Act of Congress refuses to testify, relying solely upon the contention that such testimony would tend to incriminate him under state law, and is prosecuted for that refusal, may he then rely upon other reasons, not going to the jurisdiction, to justify his refusal to testify at the investigation?

(3) Was the plea of privilege against incrimination under federal law in this case sufficient in the face of specific allegations of fact from which the legal conclusion necessarily follows that there could be no reasonable apprehension of incrimination under federal law?

PROVISIONS OF CONSTITUTION AND OF STATUTES INVOLVED

The Fifth Amendment to the Constitution provides:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

The Revenue Act of 1926 (Act of February 26, 1926, c. 27, 44 Stat. 9) provides by sec. 256, p. 50 (U. S. C. A., Title 26, sec. 1023):

> All persons, in whatever capacity acting, including lessees or mortgagors of real or

personal property, fiduciaries, and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits, and income * * * shall render a true and accurate return to the commissioner under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits, and income, and the name and address of the recipient of such payment. * * *

When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person paying the income. * * *

It provides by sec. 1104, p. 113 (see U. S. C. A., Title 26, sec. 1247):

The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his

testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

And sec. 1114 (a) of the same Act, p. 116, (U. S. C. A., Title 26, sec. 1265) provides:

> Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

The Revenue Act of 1928 (Act of May 29, 1928, c. 852, 45 Stat. 791) by sec. 148 (p. 836) reenacts sec. 256 of the 1926 Act so far as quoted above. By sec. 618 (p. 878) it amends sec. 1104 of the 1926 Act to read as follows:

> The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service,

designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

Sec. 146 (a) of the 1928 Act (p. 835) follows verbatim the phraseology of sec. 1114 (a) of the 1926 Act except that the word "title" is substituted for "Act" in the two instances in which the latter word is used in the 1926 Act.

STATEMENT

On January 23, 1930 (R. 1), the appellee was indicted in the District Court of the United States for the Southern District of Illinois, under the above-quoted sections 1114 (a) of the Revenue Act of 1926 and 146 (a) of the Revenue Act of 1928, for refusing to give testimony and supply information to an officer of the Bureau of Internal Revenue concerning payments made by him to a person or persons unknown aggregating $12,000 during the year 1927 and the same amount during the year 1928. (R. 2, 3, 4.) The indictment alleged that a duly authorized United States revenue agent had summoned the appellee to give information as to

the names and addresses of the recipients of these moneys for the purpose of assessing and collecting income taxes from them, that the summons had been served on December 27, 1929, and that the appellee had appeared before the agent on January 9, 1930, and had refused to give such information and testimony.

The appellee demurred to the indictment (R. 5, 6) and filed motions (R. 7) which the court denied (R. 12, 13). He pleaded not guilty (R. 13) and subsequently filed three special pleas (R. 15, 29, 31). The first and second of these pleas were pleas of privilege against self-incrimination—the first supported, in form at least, by the allegation that to have furnished the information would have subjected the appellee to prosecution for violations of various laws of the United States, and the second predicated upon a claim of privilege against self-incrimination for violations of state laws. The third plea alleged that the appellee had never been summoned or subpœnaed to appear before the United States District Court for his refusal to testify before the internal revenue agent, and had therefore not been given a day in court and the opportunity to have a judicial determination of his claim of constitutional privilege. (R. 31.) The United States demurred to these special pleas and the demurrers were sustained with respect to the second and third, but overruled with respect to the first plea. (R. 35–37.)

The first plea contains the formal allegation that the information withheld would have caused the appellee to be subjected to prosecution for violations of various laws of the United States, but there is incorporated in this plea a correct and authentic transcript of the proceedings before the internal revenue agent. (R. 15, 16.) The transcript shows that the refusal of the appellee to answer questions as to the identity of the recipients of the payments was at first stated to be upon the ground that such action might incriminate him (R. 22), but that upon further questioning he said that so far as he knew his answers would not incriminate him under any federal laws (R. 22, 23) and that his refusal to answer was based upon the ground that the giving of such testimony might tend to incriminate him under the laws of a State (R. 22, 23, 24, 25, 26, 27, 28; see also 19). This plea, by incorporating the transcript, not only discloses upon its face that the claim of privilege was predicated expressly and exclusively upon the assertion of a privilege against self-incrimination for violations of state law but by setting forth the answers given by the appellee as shown by the transcript further discloses that the claim of privilege against incrimination for violations of federal law, first put forward in the plea itself, was entirely without foundation. From the transcript it appears that the inquiry was directed to the identification of persons unknown to whom payments had been made by the appellee; that the appellee admitted that he had operated approxi-

mately 125 gambling machines in Madison County, Illinois (R. 22); that he was asked whether such machines could be operated without the consent of public officials and he evaded the question by saying merely that it had been done in other places (R. 23), but refused to testify that he was operating such machines without the consent of public officials (R. 23, 24) and refused to say to whom he had made the payments in question upon the ground that to give such testimony might incriminate or degrade him as a violator of state law (R. 24, 25, 26, 27). His claim of privilege, therefore, went solely to the identification of the recipients of these moneys. There is nothing to support the bald allegation that this information could have subjected the appellee to prosecution in a federal court "for violations of various laws of the United States." Thus the allegation is irreconcilable with the allegation in the plea itself of all that occurred before the internal revenue agent, is negatived by the transcript of these proceedings alleged in the plea to be correct and authentic (R. 15), and must be disregarded because it is inconsistent with the facts established by the transcript. In the face of these facts the allegation of danger of federal prosecution is a mere conclusion which is shown to be without foundation.

The court declared that the facts alleged in the plea and admitted by the demurrer showed that if the appellee had answered the questions truthfully he would have furnished testimony which would have tended to incriminate him under the laws of

the United States (R. 36); and that in stating his own reasons for refusing to testify he had placed no limitation upon the fear of incrimination, although his answers had shown that his fear was of prosecution under the laws of the State (R. 37).

The Government thereupon took this appeal.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In overruling plaintiff's demurrer to the first special plea filed by the defendant.

(2) In entering judgment in favor of defendant on said first special plea.

SUMMARY OF ARGUMENT

The gist of the offense charged was refusal to answer questions and supply information required by law at a hearing before an internal revenue agent. For this refusal the appellee did not allege any sufficient excuse. A witness may not refuse to testify in a federal proceeding upon the ground that his testimony might show that he had violated state laws.

The special plea which is here involved alleged that the testimony which had been sought might have incriminated the appellee under federal law, but a transcript of the proceedings before the agent was incorporated in that plea and it shows that the refusal was not due to fear of federal prosecution. In a prosecution for refusing to testify at a hearing, the appellee may not rely upon a broader claim than was made at the hearing.

The information sought at the hearing would not have shown that the witness had violated any federal law.

It follows that the refusal to testify was not within the constitutional privilege asserted and was an offense under the statutes.

ARGUMENT

I

THE WITNESS WAS REQUIRED BY STATUTE TO ANSWER THE QUESTIONS WHICH WERE PUT TO HIM, AND THE SPECIAL PLEA WAS BAD BECAUSE IT FAILED TO ALLEGE ANY SUFFICIENT EXCUSE FOR HIS REFUSAL TO ANSWER

An administrative investigation of the tax returns was an appropriate proceeding. The assessment of taxes is peculiarly an administrative function, and the ascertainment of facts upon which to base such an assessment is with propriety committed to the tax-collecting agencies of the Government. (See *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 42, 43; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 474, 477, 478, 486; 39 Harv. L. Rev. 697, 698.) The internal-revenue agent properly examined the witness in order to find out what person or persons received the twelve thousand dollars expended by the witness in 1927 and again in 1928, so that taxes might be imposed upon such person or persons. The recipients were subject to taxation even though the money had been paid to them for failure to enforce the laws. (*United States* v. *Sullivan*, 274 U. S. 259.)

While the District Court had jurisdiction of process to compel a witness to testify (Act of May 29, 1928, c. 852, sec. 617, 45 Stat. 791, 877; U. S. C. A., Title 26, sec. 2617), any person who willfully failed to supply the information at the time required was also guilty of a misdemeanor (Act of February 26, 1926, c. 27, sec. 1114(a), 44 Stat. 9, 116, U. S. C. A., Title 26, sec. 1265; Act of May 29, 1928, c. 852, sec. 146 (a), 45 Stat. 791, 835, pp. 4, 5, *supra*). The agent was entitled to seek judicial aid to compel the witness to testify, but was not required to do so. Unless excused from testifying by the provisions of the Fifth Amendment, the witness became subject to punishment as soon as he refused to answer.

The questions were designed to disclose the identity of unknown persons who had received taxable income. The inquiries were proper and clearly within the authority of the statute. The witness testified that he had operated approximately 125 gambling machines in the State of Illinois; he refused to tell just where he operated them or whether he had the consent of public officials in carrying on that business; he testified that he so refused because the giving of such information might incriminate him, and that he had in mind the violation of a state law and not the violation of a federal law (R. 22–28); that he did not know of any violation of any federal law (R. 22). As stated by the District Court (R. 37):

> At no time during the examination did he say that he refused to give the names of the

persons to whom the money had been paid on the ground that he would be incriminated under the laws of the United States, but his expressed fear of incrimination was by reason of the criminal laws of Illinois.

To paraphrase the language used by this Court in *Arndstein* v. *McCarthy*, 254 U. S. 71, 72, a witness may well refuse to make further revelations whenever he can fairly claim that to answer the questions may tend to incriminate him under the laws of the United States. The appellee made no such claim at the hearing, although he had had ample notice of the hearing and had legal advice. If he had made such a claim, and it had been "impossible to say from mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity," it would not have been necessary for him to answer the questions. But the witness apparently never thought, for example, that there was any conspiracy to defraud the United States, and there was nothing in the circumstances disclosed to suggest that such was the case. There was nothing to suggest any reason for refusal to answer the questions other than that the witness had been violating the gambling laws of Illinois and had been paying officials of the State for permission to do so.

A witness is not relieved from answering questions merely because he declares that to do so might incriminate him. (*Mason* v. *United States*, 244 U. S. 362, 366, 367.) The claim of privilege against

self-incrimination must be weighed. In weighing it the explanations given by the witness may be quite material, and in the present case they were conclusive, for the witness modified his broad claim and testified that he did not fear any prosecution under federal law.

It is obvious that the position taken by the witness at the hearing is to be judged by his testimony as a whole and not merely by his initial statement apart from the explanation given to that statement by the witness himself. His contention was that incrimination under state law constituted sufficient excuse for refusing to testify in the federal proceeding, and that was the only excuse which he offered.

This Court has dealt with that contention in cases in which federal statutes granted immunity from further prosecution to witnesses who testified under compulsion, so that questions which might lay the basis for federal prosecution were eliminated, just as, we contend, they are eliminated from the present controversy. In such cases the Court has decided that the Constitution did not relieve a witness before a federal tribunal of the duty of testifying because he might thereby incriminate himself under the laws of a State.

In *Hale* v. *Henkel*, 201 U. S. 43, which involved a refusal to testify before a federal grand jury in an antitrust case, the Court said (pp. 68, 69):

> The further suggestion that the statute offers no immunity from prosecution in the

state courts was also fully considered in *Brown* v. *Walker* (161 U. S. 591) and held to be no answer. The converse of this was also decided in *Jack* v. *Kansas*, 199 U. S. 372, namely, that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a federal statute, did not invalidate such statute under the Fourteenth Amendment. It was held both by this Court and by the Supreme Court of Kansas that the possibility that information given by the witness might be used under the federal act did not operate as a reason for permitting the witness to refuse to answer, and that a danger so unsubstantial and remote did not impair the legal immunity. Indeed, if the argument were a sound one it might be carried still further and held to apply not only to state prosecutions within the same jurisdiction, but to prosecutions under the criminal laws of other States to which the witness might have subjected himself. The question has been fully considered in England, and the conclusion reached by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty. *Queen* v. *Boyes*, 1 B. & S. 211; *King of the Two Sicilies* v. *Willcox*, 7 State Trials (N. S.) 1049, 1068; *State* v. *March*, 1 Jones (N. Car.) 526; *State* v. *Thomas*, 98 N. Car. 599.

The English authorities were pertinent in this connection. As pointed out in *Brown* v. *Walker*,

161 U. S. 591, at 597, the rule against compulsory self-incrimination has been firmly embedded in English jurisprudence since about the year 1700.

Of the cases cited in *Hale* v. *Henkel* it is true that in *Brown* v. *Walker*, which dealt with a violation of the Interstate Commerce Act, and in *Queen* v. *Boyes*, the courts said that the danger of prosecution in another jurisdiction was unsubstantial. In *Jack* v. *Kansas* the Court said that the danger of prosecution in a federal court based upon such testimony as was required in the state court was remote, but it added (p. 382):

> We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough.

In *King of the Two Sicilies* v. *Willcox* (1851), 7 State Trials N. S. 1050, the Court of Chancery decided that the English agents of a revolutionary government in Sicily could not refuse to produce documents which might expose their principals or themselves to penalties in a foreign country, the court saying by the Vice Chancellor (1068–1070):

> Can the defendants then object to answer that which might subject themselves to penal consequences if they should go to Sicily? I think not. The rule relied on by the defendants, is one which exists merely by virtue of our own municipal law, and must, I think, have reference, exclusively, to matters penal by that law; to matters as to which, if disclosed, the judge would be able to say, as matter of law, whether it could or could not

entail penal consequences. * * * But, in respect of penal consequences in a foreign country, this can not be. No judge can know, as matter of law, what would or would not be penal in a foreign country; and he can not, therefore, form any judgment as to the force or truth of the objection of a witness, when he declines to answer on such a ground. In the present case, indeed, there will probably be no difficulty in believing that the defendants are speaking quite truly; as the documents may, in all probability, form links in a chain of evidence which might enable the courts in Sicily to convict the defendants of high treason. But, if the principle is once admitted, it must be admitted in all its ramifications. * * * The impossibility of knowing, as matter of law, to what cases the objection, when resting on the danger of incurring penal consequences in a foreign country, may extend, furnishes very strong and, to my mind, satisfactory evidence that the objection can not be sustained. * * *

I am of opinion, for these reasons, in the absence of all authority on the point, that the rule of protection is confined to what may tend to subject a party to penalties by our own laws; and so that the objection in the present case can not be sustained.

State v. *March*, 1 Jones (46 N. C.) 526, was also cited in *Hale* v. *Henkel*. In that case on cross-examination of a witness in order to discredit him he was asked if he had not committed perjury in

Georgia. The Supreme Court of the State said (p. 528):

> But our courts, in administering justice among their suitors, will not notice the criminal laws of another State or country, so far as to protect a witness from being asked whether he had not violated them.

The decision in *Hale* v. *Henkel* was followed in *Elwell* v. *United States*, 275 Fed. 775, 778, where the Circuit Court of Appeals for the Seventh Circuit rejected the claim that a witness was excused from testifying in a federal court by the fact that he might thereby incriminate himself under the laws of Illinois.

The rule laid down in the leading case is discussed at length in Wigmore on Evidence, 2d ed., vol. 4, sec. 2258, with strong approval by that author. See also sec. 2251, pp. 830, 831.

It seems clear that the Court should adhere to the rule that the privilege against self-incrimination guaranteed by the Fifth Amendment does not extend beyond incrimination under federal law.

It is true that in *Brown* v. *Walker* and in *Hale* v. *Henkel*, *supra*, as in *Counselman* v. *Hitchcock*, 142 U. S. 547, the Court was concerned with the scope of immunity statutes and their sufficiency in protecting against future prosecution, thus precluding the claim that testimony concerning the acts involved might incriminate. In *Counselman* v. *Hitchcock* the protection afforded by the immunity statute was held not to be coextensive with the pro-

tection afforded by the Constitution, and the witness was excused from answering. In *Brown* v. *Walker* and in *Hale* v. *Henkel* it was held that as criminality under federal law was removed by the grant of immunity there could be no basis for the assertion of the constitutional privilege, even though the questions called for answers which might incriminate the witness under state law. Thus, the principle upon which these decisions rested clearly is that the constitutional privilege does not protect against self-incrimination under the laws of a sovereignty other than the United States. And that principle, we submit, must control decision in the case at bar.

In *Hale* v. *Henkel* (201 U. S. at p. 69) the Court distinguished *United States* v. *Saline Bank*, 1 Pet. 100, upon the ground that in the earlier case, where it was held that the defendants were not bound to give testimony which would expose them to punishment, the prosecution was under state law and "the federal court was simply administering the state law, and no question arose as to a prosecution under another jurisdiction." In *Ballmann* v. *Fagin*, 200 U. S. 186, decided two months before *Hale* v. *Henkel*, it appeared that the answer might have incriminated under federal as well as under state law, and the Court so pointed out. In *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113, the Court said that as the privilege had been waived it was unnecessary to consider the extent to which the

Fifth Amendment guarantees immunity from self-incrimination under state statutes.

We perceive no logical basis for the application of one rule in measuring the adequacy and scope of an immunity statute as a basis for compelling testimony which discloses acts criminal under state law and the application of a contrary rule where, as in this case, it is apparent that incrimination is confined to offenses under state law.

In *In re Willie*, 25 Fed. Cas. No. 14692e, quoted in *Mason* v. *United States*, 244 U. S. 362, 364, Chief Justice Marshall said:

> When two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded.

The rule of the Constitution that no one shall be compelled in any criminal case to be a witness against himself has quite properly been extended beyond its literal meaning, but it is not unlimited in its scope. Thus, a witness may be required to testify against himself if a statute grants him immunity from federal prosecution, even though his testimony may incriminate him under state law (*Hale* v. *Henkel*, *supra*; *Brown* v. *Walker*, *supra*); and an officer (*Wilson* v. *United States*, 221 U. S.

361) or an attorney (*Grant* v. *United States*, 227 U. S. 74) of a corporation may be required to produce its records in court even though the documents may prove that he has violated a federal law. The rule against compulsory self-incrimination, then, is given more than a literal interpretation, but the lengths to which exemption may be extended are limited by the conflicting principle that the Government is entitled to the testimony of every citizen. A government should not be deprived of testimony to which it would otherwise be entitled because of the use which some other government might possibly make of that testimony if it should become available to that other government. It is a sufficient answer to the claim of privilege that the government making the inquiry can not afterwards punish the witness for the offense which he has confessed, and that the inquiry is made in good faith, under authority of law.

II

THE CLAIM OF IMMUNITY AS MADE AT THE HEARING MAY NOT BE ENLARGED AFTER THE HEARING IS CONCLUDED AND THE WITNESS IS UNDER PROSECUTION FOR HAVING REFUSED TO TESTIFY.

The District Court said (R. 36):

> If the transcript of the evidence taken at the revenue agent's hearing had not been included in the plea, there would be little question but that the first special plea presents a clear defense to the offense laid in the

indictment, for Murdock could not have answered with entire impunity.

It is true that without the transcript of evidence the plea would not have shown on its face the existence of facts inconsistent with the rest of the pleadings, and the Government could not have demurred, but would have been obliged to prove at the trial just what occurred at the hearing. The result, however, would not have been different. The contention made in the plea could not have enlarged the claim of immunity as developed at the hearing. The offense denounced by the statute was complete when the witness refused to testify without giving an excuse which was sufficient at law. He did not then offer a sufficient excuse. The circumstances show that there was none. There is nothing to support the suggestion of the District Court that there was a conspiracy to defraud the United States. Certainly the witness knew of no such conspiracy, for he swore that he did not have in mind any violation of federal law. Whether or not there was such conspiracy, his claim of immunity was made under oath at the appropriate time and place and it was insufficient. After the hearing has come to an end that claim may not be enlarged to include matters which might have been included at the hearing, although only if, there had been actual facts which warranted their inclusion.

The privilege guaranteed by the Fifth Amendment may not be asserted unless claimed by [illegible]

fication of a refusal to answer. The appellee was not justified in refusing to answer for fear of prosecution under state law. His refusal was therefore unjustified and punishable under the statute. It follows that the demurrer to the first special plea should have been sustained, and the defendant should have been put to his trial upon the general issue under his plea of not guilty.

III

THE CONCLUSION OF THE DISTRICT COURT THAT THE ANSWERS TO THE QUESTIONS WHICH THE APPELLEE DECLINED TO ANSWER WOULD HAVE TENDED TO INCRIMINATE HIM WAS WITHOUT FOUNDATION

The failure of the appellee to claim that his answers might incriminate him under federal law was not inadvertent. His statements and those of his attorney made in his presence and in his behalf before the internal revenue agent disclose that there was not only no claim of the possibility of incrimination under federal law but that there was no possible basis for such a claim with respect to the questions which the appellee refused to answer. These questions related to the appellee's operation of gambling devices and the identification of a person or persons unknown to whom the appellee paid $24,000 over a period of two years. The operation of gambling machines and the payments to unknown persons in connection with that business were not offenses against the laws of the United

[illegible] and at the time the appellee made [illegible] of immunity he frankly stated that he did not know how his answers could incriminate him under any federal statute.

Thus, decision is controlled not merely by the appellee's failure to claim incrimination under federal law, but upon a showing affirmatively made and incorporated in the special plea that there was no possible basis for any such claim. The decision of this Court in *Mason* v. *United States*, 244 U. S. 362, shows that appellee's claim of privilege is entirely without support because there was no reason to apprehend danger of prosecution under any federal statute resulting from the disclosure of the appellee's participation in gambling operations and payments of money in connection with the conduct of that business. His fear was of prosecution under state law; and there was no apprehension of prosecution under any other law.

The formal allegation in the special plea that the information withheld would have caused the appellee to be subjected to prosecution for violations of various laws of the United States is of no importance because the plea incorporates a correct and authentic transcript of the questions asked and answers given before the revenue agent. Since this transcript discloses that no claim was made of incrimination under federal law, and, further, that any such claim would have been utterly without foundation, the formal allegation to the contrary

must be disregarded because the specific facts alleged are in complete negation of this unsupported conclusion. The District Court ignored the allegation of specific facts and accepted a legally inconsistent conclusion as admitted. Thus, the controlling facts which were admitted by the pleadings were ignored and decision was rested upon a complete negation of controlling and established fact.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

ROBERT P. REEDER,
Attorney.

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